IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR NO. 3:17cr119-WKW
	)	
HECTOR MANUEL BOSSIO	)	

ORDER

Defendant has filed several related motions alleging *Brady*[1] violations. *See* Doc. 299 ("1st motion by defendant for court to impose sanctions for non-compliance and or destruction of exculpatory evidence by government in violation of *Brady v. Maryland*"); Doc. 300 ("2nd motion by defendant for court to impose sanctions for non-compliance and or destruction of exculpatory evidence by government in violation of *Brady v. Maryland*"); Doc. 305 ("3rd motion by defendant for court to impose sanctions for non-compliance and or destruction of exculpatory evidence by government in violation of *Brady v. Maryland*"); Doc. 306 ("4th motion by defendant for court to impose sanctions for non-compliance and or destruction of exculpatory evidence by government in violation of *Brady v. Maryland*"); Doc. 318 ("5th motion by defendant for court to impose sanctions for non-compliance and or destruction of exculpatory evidence by government in violation of *Brady v. Maryland*"); Doc 319 ("6th motion by defendant for court to impose sanctions for non-compliance and or destruction of exculpatory evidence by government in violation of *Brady v. Maryland* and the magnitude thereof"); Doc. 322 ("motion to dismiss for the government's

[1] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963).

destruction of exculpatory evidence"); and Doc. 338 ("attachment: to supplement the motions for sanctions for destruction/non-compliance to requested exculpatory evidence in violation of Brady v. Maryland 1 through 6"). The court also granted defendant's request that four motions for mandatory judicial notice (Docs. 282, 285, 322, 326) be construed as supplements to the motion to dismiss (Doc. 332). *See* Docs. 369, 427.[2] The court ordered a response to the *Brady*-related motions listed above, *see* Doc. 406, and the government has responded. Doc. 428.

The government states as follows:

> [Defendant] has filed a number of motions alleging Brady violations. (Docs. 299, 300, 305, 306, 318, 322, 338)[.] In these motions he claims that the government has destroyed or withheld evidence which is exculpatory in nature, including body camera footage, footages from cameras within patrol cars and dash camera footage. As the government has previously averred, none of this evidence existed to begin with, therefore they could not have been destroyed. [Defendant's] argument to the contrary is nothing more than a naked allegation with no basis in fact.
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> It seems the crux of [defendant's] claim is that the officers who arrested him actually committed an armed robbery, stealing money and property from him at gunpoint, and that the missing footage will prove as much. This claim is absurd on its face. Furthermore, assuming for the sake of argument that [defendant's] claim had any merit, it would be equally absurd to think that the two officers would turn on cameras to record themselves committing an armed robbery. The plain fact is that neither is true. There was no robbery, and there was no footage that was destroyed. The entire premise of [defendant's] argument is nonsensical.
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> In every way, the government has complied, and will continue to comply, with all rules, laws, orders, and Department of Justice policies regarding discovery in this matter. Put simply, the government has not

[2] "The order states that the government shall so consider these documents in framing its response" to the motion to dismiss. Doc. 427. at 1.

> committed any Brady violations, and [defendant's] motions are due to be denied.

Doc. 428 at 1-2.[3]

> In *Brady,* the Supreme Court held
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> "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S., at 87, 83 S.Ct. 1194. We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, *United States v. Agurs,* 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley,* 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.,* at 682, 105 S.Ct. 3375; see also *Kyles v. Whitley,* 514 U.S. 419, 433–434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Moreover, the rule encompasses evidence "known only to police investigators and not to the prosecutor." *Id.,* at 438, 115 S.Ct. 1555. In order to comply with *Brady,* therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Kyles,* 514 U.S., at 437, 115 S.Ct. 1555.

Strickler v. Greene, 119 S.Ct. 1936, 1948, 527 U.S. 263, 280–81 (1999).

In the instant case, the government represents that the video footage that defendant seeks does not exist and, thus, it cannot be turned over to the defendant.[4] There is no *Brady*

[3] The government does not reference the four motions for mandatory judicial notice (Docs. 282, 285, 322, and 326) that the court has construed as supplements to the motion to dismiss (Doc. 322), likely because the government filed an early response to the motions and the order directing the government to consider the supplements was entered after the government's response was filed. The government has filed no supplemental response.

[4] It is well-settled that "[d]efense counsel is entitled to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination." *Carr v. Schofield*, 364 F.3d 1246, 1255 (11th Cir. 2004)(citation and internal marks omitted); *see also Banks v. Dretke*, 124 S.Ct. 1256, 1274, 540 U.S. 668, 694 (2004)(noting

violation where there is no evidence to disclose. *See Burgess v. Terry*, 478 Fed.Appx. 597, 600, 2012 WL 1889716, at *2 (11th Cir. 2012) ("[T]here can be no suppression of evidence that does not exist at the time of trial or sentencing.") (citing *Halliwell v. Strickland,* 747 F.2d 607, 609–10 (11th Cir.1984) (holding that there can be no *Brady* violation where the evidence is unknown to the prosecution or anyone connected with it)); *United States v. Hameen*, 2018 WL 6580996, *7 (M.D. Fla. Dec. 13, 2018)("the Court finds that the government has not committed a *Brady* violation, as there is no evidence before the Court that the Eagle Inn surveillance video of Defendant's arrest is in the government's possession such that *Brady* would even apply. *See Brady*, 373 U.S. at 87; *United States v. McClure*, No. 90-5001, 1990 WL 180122, at *3 (4th Cir. Nov. 21, 1990) (affirming district court ruling that evidence was not *Brady* material in part because "the government did not possess the tape" and noting that merely "reviewing the evidence had not amounted to

reasonableness of reliance on prosecution's full disclosure representation); *Hallford v. Culliver*, 379 F.Supp.2d 1232, 1247 (M.D.Ala. 2004) (reiterating "the presumption that a prosecutor would carry out his duty to disclose all exculpatory evidence and the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination ...")(citation and internal marks omitted). In much the same way, the court at some point must rely on the government's representations, despite its awareness that prosecutors have at times improperly withheld *Brady* material (although not in this district within the memory of the undersigned). Here, absent something more than mere speculation by the defendant, or his own conclusory, self-serving statements that exculpatory material may have been withheld, altered or destroyed in this case, the court accepts government counsel's representation in his role as an officer of the court that the evidence requested by the defendant simply does not exist. *See U.S. v. Blake*, 154 Fed.Appx. 148, 150, 2005 WL 2981863, at *1 (11th Cir. 2005)(Noting a district court's denial of a request for *Brady* material as moot "based on the government's representation that it had produced all the material in its possession."); *see also Moon v. Head*, 285 F.3d 1301, 1308 (11th Cir. 2002) (In order to establish a *Brady* violation, defendant must prove that the government possessed evidence favorable to the defense.).

taking possession" of it). *See also* Fed. R. Crim. P. 16 (requiring disclosure of items "within the government's possession, custody, or control....")).

Further, even assuming that defendant knows of evidence that the government has not itself located, "a *Brady* claim cannot stand if a defendant *knew of the evidence allegedly withheld* or had possession of it… ." *Broughton v. Crews*, 2016 WL 4628051, *58 (S.D. Fla. Jan. 28, 2016) (emphasis added); *see also Maharaj v. Secretary for Dept. of Corrections*, 432 F.3d 1292, 1315 (11th Cir. 2005) ("Our case law is clear that where defendants, prior to trial, had within their knowledge the information by which they could have ascertained the alleged *Brady* material, there is no suppression by the government.")(internal marks omitted); *Broughton*, 2016 WL 4628051 at *58 (Although the state never produced a tape of the 911 call, petitioner believed that 911 call existed well before the case proceeded to trial; thus, this was not a situation where the petitioner learned of the existence of exculpatory evidence for the first time after his trial) (citing *United States v. Cravero*, 545 F.2d 406, 420 (5th Cir. 1976) (observing that "[t]he purpose of *Brady* is to assure that the accused will not be denied access to exculpatory evidence known to the government but unknown to him) (emphasis added); *United States v. Manthei*, 979 F.2d 124, 127 (8th Cir. 1992) (*Brady* is only violated if evidence is discovered, after the trial, of information which had been known to the prosecution but unknown to the defense)). Thus, the court finds no *Brady* violation in this case.

To the extent that defendant claims that the government has destroyed evidence, rather than merely withholding it, he actually may be alleging a *Trombetta* and *Youngblood*

violation. *See California v. Trombetta*, 467 U.S. 479, 489 (1984); *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). As *Hameen* explains,

> *Brady* addresses the government's obligations when exculpatory evidence is in the government's possession.
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> In *Trombetta* and *Youngblood*, the Supreme Court addressed "the extent to which the Due Process Clause imposes on the government the additional responsibility of guaranteeing criminal defendants access to exculpatory evidence beyond the government's possession" and "the government's duty to take affirmative steps to preserve evidence on behalf of criminal defendants." *See Trombetta*, U.S. 479 at 486; *Youngblood*, 488 U.S. at 55. Thus, *Trombetta* and *Youngblood*, and not *Brady*, govern circumstances in which the government no longer possesses the disputed evidence because it was lost, destroyed, or otherwise not preserved before trial. *See United States v. Femia*, 9 F.3d 990, 993 (1st Cir. 1993) ("The Supreme Court's jurisprudence divides cases involving nondisclosure of evidence into two distinct universes. *Brady* and its progeny address exculpatory evidence still in the government's possession. *Youngblood* and *Trombetta* govern cases in which the government no longer possesses the disputed evidence.").

Hameen, 2018 WL 6580996 at *5-6. However, as noted above, the government represents that it never possessed the evidence in question because that evidence never existed. Self-evidently, evidence that does not exist can neither be preserved or destroyed. Thus, the court finds no violation of *Trombetta* and *Youngblood* here.

Accordingly, it is

ORDERED that defendant's motions in Docs. 299, 300, 305, 306, 318, 319, 338 are DENIED. Because Doc. 322 ("motion to dismiss for the government's destruction of exculpatory evidence") is a motion to dismiss, it will be addressed by separate order.

Done, on this the 22nd day of March, 2019.

/s/ Susan Russ Walker
Susan Russ Walker
United States Magistrate Judge